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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 1306/2022 & CM APPLs.3796-3797/2022**

KAMLESH KUMAR JHA Petitioner

Through: Mr.Shreenath A.Khemka, Advocate
with Mr.Ganesh A.Khemka and
Mr.Sumit Singh, Advocates.

versus

**DIRECTORATE GENERAL BORDER
ROADS AND ORS.** Respondents

Through: None.

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Reserved On : 21st January, 2022

Date of Decision : 03rd February, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

MANMOHAN, J:

1. Present writ petition has been filed challenging the rejection letter dated 18th February, 2021 and the show cause notice dated 10th January, 2022. Petitioner also seeks directions to the respondent/ Border Roads Organisation to allow the Petitioner's application for deputation to the National Highways Authority of India [NHAI] on the ground of parity.

2. In the writ petition, it has been averred that the Petitioner is an Executive Engineer (Civil) in the Border Roads Organisation and is aggrieved by the non-grant of departmental permission to proceed on deputation to NHAI. It is further averred in the writ petition that the

Petitioner had applied for deputation to NHAI on 1st December, 2020 and had forwarded a copy of his application to be processed by the Border Roads Organisation. According to the Petitioner, after receiving the consent of all senior officers, including the Additional Director General Border Roads, the Petitioner's Application was forwarded to the Director General Border Roads, however, his application was rejected vide impugned letter dated 18th February, 2021 on the ground that the Border Roads Organisation intends to post the Petitioner to a high altitude area to fill vacant positions of Executive Engineers in the ongoing Border Roads Organisation projects.

ARGUMENTS ON BEHALF OF THE PETITIONER

3. Learned counsel for the petitioner stated that the Petitioner had already completed the pre-condition of two years service in the high altitude area, as mandated under clause 7 (k) of Standard Operating Procedure on Deputation. He emphasised that the Petitioner had served three years and three months in high altitude area, five years in extremely hostile area and three years and ten months in Hard Hard Area (HHA). Consequently, he contended that the petitioner satisfied the eligibility criteria for proceeding on deputation and denial of Departmental consent on the ground that Petitioner was to be posted to a high altitude area was erroneous.

4. Learned counsel for the Petitioner further stated that the strength of Executive Engineers (Civil) in the Border Roads Organisation is in excess of the strength of Executive Engineer posts. In support of his contention, he relied upon the sparability certificate issued by the Respondent itself. Thus, according to him, allowing the Petitioner to proceed on deputation would not lead to any deficiency in the cadre strength of Executive Engineers in

Border Roads Organisation.

5. Learned counsel for the Petitioner stated that it was not open to the Petitioner to withdraw his application for deputation and if the same was withdrawn, it would be prejudicial to the interest of the petitioner. He pointed out that as per Clause 2 of the Important Instructions of the Advertisement floated by NHAI, the applicants were barred from withdrawing their candidature.

6. Learned counsel for the Petitioner stated that on 30th December, 2021 and 4th January, 2022, the Petitioner requested the Department to reconsider and allow the Petitioner's application for deputation. He pointed out that rather than processing the Petitioner's requests in accordance with the similarly placed Officers, the Border Roads Organisation issued a show cause notice dated 10th January, 2022, alleging that the Petitioner had appeared before the NHAI Interview Board on 19th April, 2021 without obtaining prior approval whereas the request of similarly placed officers had been acceded to in the past.

7. He pointed out that in the case of a similarly placed person i.e. Ram Asra Khural, who was also an Executive Engineer (Civil) in the Border Roads Organisation and had sought deputation to NHAI, the Gauhati High Court in W.P.(C) 2804 of 2020 had struck down high altitude area postings as a reason to deny permission for deputation given that many others had been granted permission to go on deputation. He stated that the decision of learned Single Judge in W.P.(C) 2804 of 2020 was confirmed by the Division Bench in *The Union of India & Ors. v. Ram Asra Khural & Ors.*, **W.A. 188 of 2021.**

8. He admitted that a Division Bench of this Court in the case of *Shyam Singh & Ors. vs. Union of India & Ors.* had rejected the claim for parity. However, he emphasised that the sole ground for rejecting the candidature therein was that the petitioner therein had not completed minimum twenty years of service before seeking deputation.

COURT'S REASONING

AN EMPLOYEE OF THE BORDER ROADS ORGANISATION HAS NO FUNDAMENTAL RIGHT TO CLAIM A DEPUTATION TO ANY OTHER ORGANISATION OR DEPARTMENT LIKE NHAI. HE HAS ONLY A RIGHT OF FAIR CONSIDERATION IN ACCORDANCE WITH THE POLICY AND NEEDS OF THE ORGANISATION.

9. This Court is of the view that an employee of Border Roads Organisation has to work primarily in the said Organisation. An employee of the Border Roads Organisation has no fundamental right to claim a deputation to any other Organisation or Department like NHAI. The employee has only a right of fair consideration in accordance with the policy and needs of the organisation.

THE ORGANISATIONAL INTEREST OF BORDER ROADS ORGANISATION IS OF PARAMOUNT IMPORTANCE AND IF ITS SUPERIOR OFFICERS ARE OF THE OPINION THAT THE PETITIONER IS A 'SUITABLE OFFICER' TO BE POSTED IN A HIGH ALTITUDE AREA, THEN THE COURT WOULD NOT SUBSTITUTE ITS OWN JUDGMENT FOR THE JUDGMENT OF THE MANAGEMENT.

10. In the present case, the Petitioner's application for deputation has not been rejected by the Border Roads Organisation on the grounds that he did not satisfy the eligibility criteria for deputation or that if he proceeded on deputation, there would be a deficiency in the cadre strength of Executive

Engineers, but on the ground “...that numerous posts of EE(Civ) have been lying vacant in Project/Fmns located in HAA due to non availability of suitable officer. The officer has completed his cooling off period for posting to HAA and his next posting will be issued to HAA. Therefore, due to Organizational interest request for deputation of the officer has not been granted to by the ‘Competent Authority’. (See: the impugned letter dated 18th February, 2021).

11. It is settled law that if the senior management of the organisation is of the opinion that the organisation’s interest would be better served if the employee continues to work within the organisation, then the Court would not substitute its own judgment for the judgment of the management.

12. Consequently, this Court is of the view that the organisational interest of Border Roads Organisation is of paramount importance and if the superior officers of the Border Roads Organisation are of the opinion that the Petitioner is a ‘Suitable Officer’ to be posted in a high altitude area, then the same calls for no interference in writ jurisdiction, especially when the impugned decision is not perverse.

13. The submission of the petitioner that there are 206 officers in the EE post with the BRO against a sanctioned strength of 194 and therefore, there being an excess of number of officers, the petitioner is entitled to be granted permission to proceed on deputation, also cannot be accepted. Apart from the fact that this submission is not pleaded in the Writ Petition but was raised only at time of oral arguments, it is for the organisation to determine the number of officers required by it for undertaking the task assigned to it. Merely because number of officers appointed are in excess of the sanctioned

strength does not vest any right in any of the officers to claim permission to proceed on deputation.

INVOCATION OF ARTICLE 14 OF THE CONSTITUTION OF INDIA IS NOT MADE OUT BY THE PETITIONER IN THE FACTS OF THE PRESENT CASE

14. In the present case, apart from asserting that 15(fifteen) officers have been allowed by the respondent-BRO to proceed on deputation while the petitioner's application has been rejected, the petitioner has not provided the details of these officers or how his case for being allowed to proceed on deputation is superior to them. This court is not expected to indulge in a fishing and roving inquiry to determine the comparative merit and demerit of the cases of these officers, especially in their absence. The plea based on Article 14 is completely vague and without any merit. In ***Ram Asra Khural*** (supra), the Gauhati High Court has found that some of the officers to whom permission to proceed on deputation had been granted were not even eligible under the Respondent's SOP for deputation. Based on such finding, the learned Single Judge of the Gauhati High Court granted the relief to the petitioner therein. In the present petition, it has not been asserted that any of the officers to whom permission to proceed on deputation has been granted is otherwise ineligible for the same. Consequently, the ground of discrimination as made out in the case of ***Ram Asra Khural v. The Union of India & Ors., W.P.(C) 2804 of 2020*** is not attracted to the facts of the present case.

15. Further, with all due respect, this Court is not in agreement with the view taken by Gauhati High Court. In fact, the consistent view of this Court has been that Article 14 of the Constitution of India is a positive concept and

does not promote negative equality. The Supreme Court in *Union of India v. M.K. Sarkar, (2010) 2 SCC 59* has held, “Article 14 is positive concept and cannot be enforced in a negative manner. Irregularity and illegality cannot be perpetuated on the ground that illegal benefits have been extended to others.” The Supreme Court in *Basawaraj and Another Vs. Special Land Acquisition Officer, (2013) 14 SCC 81* has also held, “Article 14 does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated.” Even the Division Bench judgment of this Court relied upon by learned counsel for the petitioners in *Shyam Singh & Ors. vs. Union of India & Ors* (supra) has held that “... It is well settled that Article 14 is a positive concept and no direction can be issued on the plea of discrimination, wherein the earlier decision itself was improper and wrong. In view of the above findings, we find no merit in the present writ petition and other connected writ petitions and they are dismissed.”

THE INTENT OF THE PETITIONER IN APPEARING BEFORE THE INTERVIEW BOARD WITHOUT PRIOR PERMISSION WAS TO ‘FORCE THE HAND’ OF THE RESPONDENT.

16. From the documents on record, it is apparent that the Petitioner had applied for prior permission from the respondent/ Border Roads Organisation for appearing before the Interview Board. However, despite non-receipt of approval/permission from Border Roads Organisation, the Petitioner had gone ahead and appeared before the NHAI Interview Board.

This Court is of the view that the intent of the Petitioner in appearing before the Interview Board without prior permission was to ‘force the hand’ of the respondent/ Border Roads Organisation.

17. This Court is also of the view that if the Petitioner had withdrawn his application, he would have suffered no real prejudice as the only consequence of withdrawal of application is that Petitioner’s name would not be considered for deputation to NHAI for the next three years. In view of the Petitioner’s next posting to high altitude area, it is highly unlikely that he would be in a position to apply for deputation to NHAI for the next three years.

18. For the aforesaid reasons, the present writ petition along with pending applications, being bereft of merits, is dismissed.

MANMOHAN, J

NAVIN CHAWLA, J

FEBRUARY 03, 2022
AS/KA

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